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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB 11 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS

Adelphia Communications Corporation
Arizona Cable Television Association
Cable TV of Georgia
Cable Video Enterprises
Coaxial Communications, Inc.
Hauser Communications
Mid-America Cable Television Association
Mt. Vernon Cablevision
Pennsylvania Cable Television Association
Prestige Cable TV
Star Cable Associates
Tele-Media Corporation
WestStar Communications, Inc.
Whitcom Investment Company

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Date: February 11, 1993

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SUMMARY

The Commission should implement effective competition tests that prevent regulatory interference where effective competition exists. "Households" include all dwelling units in multiple dwelling unit ("MDU") residences that may receive subscription television service. The Commission should deregulate basic cable rates to MDU subscribers where rival providers meet the 50% and 15% thresholds as to MDUs in the franchise area, even if other segments of the franchise area remain regulated. The Commission must also recognize that rival providers such as DBS and TVRO "offer" their services when they are technically capable of providing service to a household. A cumulative approach should be used to measure the 15% penetration test. When rivals meet the 15% and 50% thresholds, their programming offerings must be presumed "comparable" to that of the incumbent cable operator. In the first test for effective competition, the entire franchise area is the basis for determining whether the cable operator has less than 30% penetration of households.

Under the 1992 Cable Act, franchising authorities may not require basic tiers beyond the statutory minimum, and any franchise agreements attempting to do so are preempted. The 1992 Cable Act does not prohibit retiering, and in fact recognizes the cable operator's right to retier. Although the statute limits cable operators to offering one basic tier, it does not prohibit the offering of expanded packages that include the basic tier.

FCC jurisdiction to regulate basic rates is limited to instances where the Commission disapproves or revokes a local franchising authority's certification. The Commission may not exercise jurisdiction where not permitted by a state, where the

Commission finds that effective competition exists, where the franchising authority lacks the financial resources to regulate, where a franchising authority chooses not to regulate basic rates, or where a franchising authority has contracted not to do so or otherwise lacks legal power to regulate.

As part of its certification to regulate basic rates, a franchising authority must show a lack of effective competition. The Commission must afford cable operators due process rights during certification, revocation, and local regulation procedures, including the right to directly inform the Commission of effective competition. The Commission must revoke or suspend the franchising authority's regulatory power when the franchising authority substantially deviates from its certification requirements.

The basic rate formula should be based on a benchmark approach. Cost of service regulation was widely criticized, both as an alternative to and an element of benchmarks. Price caps for cable systems with rates below the benchmark would penalize "good actors" and would create incentives to reduce quality and service. The benchmark should be a per-channel rate. Formulas based solely on rates charged by systems subject to effective competition are fatally flawed. The per-channel rates proposed by some cities and the NAB are unrealistic and based on erroneous information. The per-channel benchmark should be based on either current average rates or past regulated rates from approximately December 31, 1975, adjusted for inflation. If the Commission wants to include rates of systems subject to effective competition, it could average such rates with current average rates and past regulated rates. The basic rate benchmark should be based on systems with comparable activated channel capacity, density, plant age, percent of aerial vs. underground cable, system size, MSO size, off-air broadcast signal availability, and regional cost of labor.

Only equipment used solely to receive basic service may be regulated based on actual cost. Equipment rates should be deregulated where competition from independent suppliers exists. Cable operators should be permitted to bundle the marketing of various equipment components. The price of various equipment components, installations, additional outlets and service calls should be examined for reasonableness in an overall "basket."

The Commission must permit cable operators to itemize as a separate line item all governmentally-imposed costs. Franchising authorities may not censor or edit subscriber's cable bills.

The 1992 Cable Act provides for cable operators to implement and franchising authorities to enforce basic rate regulation. Thus, rate setting is left to the cable operator. Cable operators may implement the initial basic rate pursuant to a benchmark, as well as subsequent rate increases. Either action is subject to a thirty-day review period. Franchising authorities issue an order that a basic rate increase is not reasonable during this period. If the franchising authority approves the increase or fails to act, the rate becomes effective and cannot be reversed. A 120-day review period is inconsistent with the statute. Franchising authorities may not order refunds of basic rates. Formal rate hearings are unnecessary. Disclosure of proprietary information in order to justify a rate increase is also unnecessary under a benchmark approach. Basic rate disputes between cable operators and franchising authorities should be resolved by the Commission, not local courts.

According to the 1992 Cable Act, regulation of non-basic rates requires a more lenient approach than regulation of basic rates. The statute prohibits regulation of per channel and per program services offered on an unbundled basis, even when also offered as part of a package. Non-basic rate complaints must allow the Commission to conclude that the rate is unreasonable. Mere allegations of unreasonableness are insufficient. Furthermore, any non-basic benchmark must take into account the significant new regulatory costs imposed by the 1992 Cable Act.

The Commission should exempt small systems from basic rate regulation, or establish separate benchmarks that account for small system characteristics, such as low density. The statute's uniform rate structure and discrimination provisions should accommodate differences in governmentally-imposed costs between franchise territories, permit cable operators to negotiate individual contracts with MDU owners, and permit cable operators to meet the price of a competitor that contests a portion of the operator's franchised territory.

A negative option occurs where a subscriber is provided with and billed for a new programming package or service (including equipment) consisting entirely of services to which the subscriber did not subscribe, without the subscriber's request. Retiering or repackaging of services previously subscribed to, even if accompanied by a rate increase, is not a negative option. Similarly, a mere rate increase for an existing or revised tier is not a negative option. Both actions are fully subject to rate regulation. Likewise, an evasion occurs where the cable operator attempts to avoid rate regulation (e.g., by removing services from a tier) by providing less service without a corresponding rate reduction. Thus, any explicit rate increase is not an evasion, but rather exposes the cable operator to rate review. Retiering is not an evasion, unless an implicit rate increase results. An evasion cannot be deemed to occur before April 3, 1993.

The Commission should deem all rate regulation agreements in effect upon implementation of its rules grandfathered, and fully enforceable by the franchising authority or the cable operator. Cost of service information should not be collected unless cost of service regulation is implemented. The Commission's cable survey forms should be addressed in a separate proceeding.

The Commission must allow a reasonable time between the implementation of its rate regulations and their effective date. We believe that January 1, 1994 is the earliest possible date.

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In the Matter of:	)	
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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-266**
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REPLY COMMENTS

Fleischman and Walsh, on behalf of Adelphia Communications Corporation; Arizona Cable Television Association; Cable TV of Georgia; Cable Video Enterprises; Coaxial Communications, Inc.; Hauser Communications; Mid-America Cable Television Association (representing the states of Kansas, Nebraska, Oklahoma and Missouri); Mt. Vernon Cablevision; Pennsylvania Cable Television Association; Prestige Cable TV; Star Cable Associates; Tele-Media Corporation; WestStar Communications, Inc.; and Whitcom Investment Company (collectively "Commenters") hereby respectfully replies to various comments filed in response to the above-captioned Notice of Proposed Rule Making[1] regarding implementation of the rate regulation provisions contained in the

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[1]Notice of Proposed Rulemaking in MM Docket No. 92-266, ___ FCC Rcd ___, adopted December 10, 1992 ("Notice").

Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[2]

INTRODUCTION

As the Commission proceeds with crafting an all-encompassing regulatory model that will meet the statutory objectives of overseeing the rates cable operators charge for their service, the Commenters have urged the Commission to bear in mind that, as Congress recognized, the deregulation of rates after 1986 played a key part in increasing the quality and diversity of cable programming, thereby directly benefitting consumers of cable television.[3] Although Congress intended, by including Section 623 in the Act, to protect consumers from unreasonable rates charged by some cable operators, the Commission should not lose sight of the interrelationship between the rates a cable operator charges for its service and the quantity and quality of that service.

In implementing the re-regulation of the cable industry, Congress has left to the Commission the complex task of filling in the "fine print" of the regulatory scheme Congress devised. It is this "fine print" that will govern the future development of the cable industry through the remainder of this century and into the next. To the extent possible, therefore, in the rules that it devises to re-regulate cable television, the Commission should seek to minimize any inhibiting effect the rules might

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[2]Pub. L. 102-385, 106 Stat. 1460 (1992), amending the Communications Act of 1934 (the "Act"), 47 U.S.C. § 151 et seq.

[3]See H.R. Rep. No. 628, 102d Cong., 2d Sess. 79, 86 (1992) ("House Report").

have on the flow of capital to the cable industry, the growth in plant, channel capacity, and the increased diversity of programming.

Due to the voluminous nature of the comments filed in response to the Notice and the short deadline established for replying to those comments, the Commenters shall not attempt to respond to each and every point raised by other commenters. Rather, this reply is intended to supplement the comments filed by the Commenters by highlighting certain areas and issues raised by other parties in this proceeding.

I. EFFECTIVE COMPETITION TEST

The 1992 Cable Act is intended to allow regulatory scrutiny of basic cable service rates only where effective competition does not exist. For this reason, Congress clearly established a preference for competition over regulation;[4] regulation is an imperfect mechanism which often produces side effects highly detrimental to consumers.

The Commenters urge the Commission to adopt regulations to implement the effective competition tests that prevent regulatory interference wherever effective competition exists.[5] Cable

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[4]47 U.S.C. § 543(a)(2) ("Preference for competition").

[5]The City of Mesa, AZ raises a question regarding the application of the effective competition test to cable overbuilds. City of Mesa, AZ Comments at 2. The Commenters suggest that when two cable systems coexist in the same franchise area and one system meets the fifty percent/fifteen percent test for effective competition, then neither system should be subject to basic rate regulation. Otherwise, an application of the test will produce the inequitable result in a community like Mesa that one system is deregulated while the other system remains

operators often face competition for subscribers residing in multiple dwelling units ("MDUs") from SMATV and MMDS providers. Therefore, the Commission must recognize that "households" include all dwelling units in MDUs that may receive subscription television service. The National Association of Telecommunications Officers and Advisors ("NATOA") suggests that MDU subscribers should not be counted as individual households if the landlord does not permit each resident to choose an alternative service.[6] However, the landlord's relation with its tenants is not relevant to the penetration levels of the multichannel video programming service, since the attractiveness to a rival of each MDU will be related to the number of potential subscribers in the building. Thus, each unit in an MDU must be counted as a "household" in applying the effective competition test, even if a single bill is sent where an MDU is billed on a "bulk" basis.[7]

SMATV and MMDS providers are under no obligation to serve an entire franchise area and they typically focus only on MDUs. To allow the cable operator to compete in the MDU segment of its franchise area, the Commission should deregulate basic cable rates to MDU subscribers where rival providers meet the fifty percent and fifteen percent thresholds as to the MDUs in the

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regulated.

[6]NATOA Comments at 17, n.25.

[7]Massachusetts Community Antenna Television Commission ("MCATC") Comments at 18 (agrees that each unit in the MDU should be counted if the FCC permits bulk rate agreements).

franchise area, even though basic rates to single family homes might continue to be subject to regulation.

Cable operators also face competition from DBS and TVRO providers, and emerging competitors such as LMDS and video dialtone. These rival multichannel video programming distributors use different technologies than the cable operator to provide their service. To more accurately measure these competitors, the Commission must recognize that rival providers "offer" their services to a household when they are technically capable of providing service to that household. For the FCC to make accurate determinations of effective competition,[8] it must require that MMDS, SMATV, DBS, TVRO, LMDS and video dialtone providers report annual data of their subscribers and service areas so that the Commission can make a sound determination with respect to the second test for effective competition.[9]

Some parties, representing the interests of regulators who may lose their regulatory control where effective competition is found, seek to narrow the scope of the effective competition tests. The City of Austin, TX, et al. ("Austin, TX"), recommend that the effective competition test apply only where there is "head-to-head" competition, i.e., deregulation would occur only as to those households which have a choice of available

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[8]The FCC is required to determine whether the cable operator is subject to effective competition. 47 U.S.C. § 543(a)(2). However, franchising authorities, as part of their certification that they have legal authority to regulate, should be required to show evidence of lack of effective competition.

[9]There are presently no readily available sources regarding the subscription levels and areas of service of these alternative distributors.

multichannel video programming distributors.[10] Because of the threat of competitive entry, however, the effective competition test should be satisfied when two or more multichannel programming distributors operate in the same franchise area, but are not necessarily in head-to-head competition throughout the entire area.[11] Where two or more competing and independent providers are both technically able to provide service to at least fifty percent of the households in the area, any single provider is likely to implement competitive responses or it will eventually lose subscribers to other providers. Where the rival providers are able to achieve penetration levels greater than fifteen percent, the cable operator will certainly implement appropriate competitive adjustments. Thus, "head-to-head" competition is not necessary for the statutory effective competition test to be satisfied.

NATOA and Municipal Franchising Authorities ("MFA") recommend that the fifteen percent penetration rate not be based on an aggregate percentage of competitors in the franchise area.[12] This interpretation not only ignores the language of the statute,[13] it misconstrues the function of the effective

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[10]Austin, TX Comments at 17; see also NATOA Comments at 14-16.

[11]This is consistent with the contestability theory which states that competitive threat of potential entrants can act as a deterrent on prices offered by existing firms. See United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964).

[12]NATOA Comments at 10-11; MFA Comments at 13.

[13]47 U.S.C. § 543(l)(1)(B)(ii)(fifteen percent threshold is measured by the penetration of "services offered by multichannel programming distributors other than the largest multichannel

competition test. Again, the test serves to measure whether competitive forces have deprived the cable operator a sufficient amount of its potential business (more than fifteen percent) such that the operator must make appropriate competitive adjustments. It is irrelevant whether one or many competitors are sustaining the rival force. Thus, the Commenters concur with the Commission's tentative view in paragraph 9 of the Notice that a cumulative approach be used to measure the fifteen percent penetration test.

The Commenters urge the Commission to adopt the presumption suggested in paragraph 9 of the Notice that when rivals meet the fifteen percent and fifty percent thresholds, the rivals' programming offerings must be presumed to be "comparable" to that of the incumbent cable operator. Some parties insist that the Commission engage in a comparison of the types of programming[14] and the number of channels that rival distributors offer.[15] However, a comparison of the types of programming offered engages the Commission in a dangerous exercise of making content-based determinations. A comparison of the number of channels is unnecessary since only "multichannel video programming distributors" are counted in the second effective competition test, not single channel competitors such as television stations.

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video programming <u>distributor</u>" (emphasis added)).

[14]<u>See</u> Austin, TX Comments at 19; NATOA Comments at 11; New York State Consumer Protection Board Comments at 5.

[15]<u>Id</u>.; Consumer Federation of America ("CFA") Comments at 116, n.101; National Association of Broadcasters ("NAB") Comments at 12-13.

Further, establishing a number of channels that is "comparable" may allow the rival competitors to control when the cable operator would be deregulated and may inhibit the expansion of programming on rival services.

Lastly, the Commenters urge the Commission to implement the statutory language in the first test for effective competition that the entire franchise area is the basis for determining if the cable operator has less than thirty percent penetration of households.[16] NATOA states that the Commission should consider only the portion of the franchise area that is actually served by the cable operator.[17] This interpretation is contrary to the express words of the statute.[18] In franchise areas where the cable operator achieves less than thirty percent penetration, it is apparent that consumers have not placed a high demand on cable service. In such cases, a cable operator does not build throughout its franchise area because the demand for service in the unbuilt areas does not justify the cost of providing service.

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[16]47 U.S.C. § 543(l)(1)(A).

[17]NATOA Comments at 14; see also Austin, TX Comments at 18.

[18]In addition, the statute aggregates penetration levels of cable operators in the same franchise area. Thus, the effective competition test would not be satisfied in the situation posited in the Austin, TX Comments at 18, n.20, since three operators, each with eighty-nine percent penetration in one third of the franchise area, would aggregate to a total of eighty-nine percent penetration.

II. BASIC CABLE SERVICE REGULATION

A. Components Of Basic Service Subject To Regulation.

As the Commenters explained in their initial comments, Congress' objective in establishing Section 623(b) of the Act was that a "low priced tier of programming"[19] be made available to cable subscribers.[20] This objective can only be met if local and state governments are unable to require that cable operators offer large basic service tiers that include expensive cable services not required by the statutory minimum in Section 623(b)(7)(A).[21]

Some parties, however, evidence a mistaken belief that cable consumers can have it both ways: a basic service tier, bloated with additional cable services beyond those specified in the statute, at an unrealistically low price. This belief is premised upon the notion that cable operators may be prohibited by their franchise agreements from creating basic service tiers that contain only the statutory minimum contents.[22] As the Commenters demonstrated in their initial comments, however, the 1992 Cable Act is replete with indications that the statutory definition of the basic service tier <u>must</u> preempt franchise requirements to the contrary.[23] One such indication may be found

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[19]House Report at 81-82.

[20]Comments filed by Fleischman and Walsh on behalf of Adelphia Communications, <u>et al</u>. ("Fleischman and Walsh Comments") at 11.

[21]47 U.S.C. § 543(b)(7)(A).

[22]Austin, TX Comments at 22-23.

[23]Fleischman and Walsh Comments at 14-15.

in Section 623(b)(7)(A)(iii), which specifically excepts any broadcast "signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station" from inclusion in the basic service tier.[24] Accordingly, any franchise requirement that such signals be included on the basic service level would necessarily be preempted by the Section 623(b)(7)(A)(iii) exception.

Another indication that Congress intended to preempt any franchise requirements that conflict with the 1992 Cable Act's basic service definition is found in the Section 325 provision that certain broadcast stations may elect to pursue retransmission consent for the carriage of their signals rather than asserting their Section 614 and 615 must-carry status.[25] Where a broadcaster negotiates with a cable operator for retransmission consent and fails to reach an agreement over compensation for carriage of its signal, that broadcaster's signal must be deleted from the cable system. The 1992 Cable Act, therefore, by operation of law, preempts any franchise requirements specifying the content of the basic service tier.

Certain parties go on to suggest that, by omission of language specifically allowing retiering, Congress evidenced its intent to prohibit retiering.[26] In addition, various comments claim that retiering by cable operators constitutes a per se

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[24] 47 U.S.C. § 543(b)(7)(A)(iii).

[25] Id. at § 325.

[26] See Austin, TX Comments at 23-24; Political Subdivisions of the State of Minnesota ("Minnesota Cities") Comments at 6.

evasion of the 1992 Cable Act's rate regulation provisions.[27] These claims could not be further from the truth. First, under Section 623(h) of the Act, the Commission is directed to establish methods for preventing rate regulation evasions resulting from retiering.[28] Although this section implies that cable operators might attempt to evade the Act's rate regulation provisions by retiering, it must be recognized that the section does not prohibit retiering, rather it expressly recognizes the cable operator's right to retier.

Second, the right of cable operators to retier is also recognized in Section 623(b)(7)(B) of the Act, which allows that "cable operators may add additional video programming signals or services to the basic service tier."[29] Accordingly, the decision to add such optional programming to the basic level lies solely within the operator's discretion and cannot be dictated by governmental authorities.

It is, in fact, a fundamental principle underlying the whole of Section 623(b) of the Act that cable operators be able to move video programming services to or from one tier or another. By expressly creating a statutory definition of the basic tier that would be subject to local rate regulation, Congress left within the absolute discretion of the cable operator the decision of whether or not to include additional services in that tier above

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[27] See Austin, TX Comments at 23-24; Minnesota Cities Comments at 6; City of Marshfield, WI Comments at 1-2.

[28] 47 U.S.C. § 543(h).

[29] Id. at § 543(b)(7)(B) (emphasis supplied).

and beyond the mandatory services prescribed by the statute.[30] Any action a cable operator takes to create a basic service tier in accord with the statute's direction must, therefore, be viewed as an attempt to comply with such statutory direction, rather than as an evasion of the new law.

Simply stated, had Congress intended to ban retiering entirely, it could easily have done so. Instead, Congress left cable operators free to retier their service offerings, consistent with the basic service definition of Section 623(b)(7),[31] and only proscribed retiering where engaged in as an evasion of the Act's rate regulation provisions.

As the Commenters explained in their initial comments, any retiering and reconfiguration of a cable operator's basic and upper tiers is not necessarily free from regulatory review. Where a cable operator's retiering and reconfiguration result in implicit rate increases, subscribers and franchising authorities may challenge those rate increases as unreasonable under Section 623(c) of the Act, and the Commission must consider and resolve

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[30]Comments filed by the Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas ("Joint AG Comments") suggest that, as a means of prohibiting retiering, the Commission adopt rate regulations that require a cable operator not subject to effective competition to offer a basic service tier comparable to that offered by the operator on January 1, 1992. Joint AG Comments at 11. These parties, however, ignore the fact that, under Section 623 of the Act, Congress left the Commission no discretion to adopt regulations of cable operators' basic tiers other than in accordance with the statutory definition of the basic tier.

[31]As the Commission correctly recognizes, Section 623(b)(7) itself provides cable operators the flexibility to retier their service offerings in order to bring their basic service into line with the Act's new requirements. See 47 U.S.C. 543(b)(7); Notice at ¶ 127.

such complaints.[32] The availability of such review upon the complaint of even a single subscriber, which might result in a "bad actor" finding against a cable operator, creates more than adequate disincentives to any retiering which would cause resultant rates to fall outside the applicable benchmark.

Finally, some parties contend that the marketing of cable services is the key factor in determining whether a service is part of basic service and that the 1992 Cable Act does not alter the Section 602(3) definition of basic cable service, nor does it overrule the decision in American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) ("ACLU").[33] These parties argue that the buy-through prohibition is intended to prevent cable "operators from tying other services to basic, and escaping regulation of what, to subscribers, is basic service."[34] Any expanded package that includes the basic tier of service, they contend, must be treated as simply another basic service tier, subject to rate regulation in its entirety; to allow otherwise would be to sanction evasions of the buy-through prohibition. Accordingly, these parties assert, the holding in ACLU is not overruled by the 1992 Cable Act.

As the Commenters demonstrated in their initial comments, however, the indications that Congress intended the 1992 Cable Act to amend the 1984 Cable Act's basic tier definition, and

[32] 47 U.S.C. 543(c).

[33] See Greater Grand Rapids Area Cable Commission Comments at 13-14; Austin, TX Comments at 25-26.

[34] Austin, TX Comments at 25-26.

thereby to overrule the decision in ACLU, are numerous. For instance, both the 1992 Cable Act's buy-through prohibition and its definition of programming services make reference to the basic service tier.[35] In addition, the bifurcated rate regulatory structure of the new law evidences an intent that cable operators offer no more than one tier of basic service subject to local regulation. Cable programming service rates are intended to be subject to rate review only upon complaints to the Commission.[36] Were cable operators to offer multiple or cumulative tiers of basic service, the jurisdictional split of regulatory authority established under the new law would be frustrated.

Additionally, if the new law is not viewed as overruling the decision in ACLU, cable operators would be able to offer several tiers of basic service, cumulatively marketing and pricing successive tiers, rather than doing so by increments. In so doing, cable operators could avoid the buy-through prohibition by forcing subscribers to buy upper tiers of service as a condition to obtaining premium or pay-per-view programming. Such a result would directly contravene Congress' stated desire that subscribers be required to buy-through only one tier of basic service in order to obtain premium programming. The discussion in ACLU relating to "multiple tiers of basic" is, therefore, implicitly overruled by Congress' enactment of the 1992 Cable Act.

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[35]See 47 U.S.C. §§ 543(b)(8), 543(a)(2).

[36]Id. at § 543(a)(2).

Although the new law clearly limits cable operators to offering only one tier of basic service, Section 623 does not prohibit the offering of expanded packages that include the basic tier of service. So long as a cable operator offers a separately available basic service tier at a separate price, that cable operator may offer an expanded service package that incorporates the basic service level with one or more additional tiers of service. This would, however, only be allowed if the separately available, separately priced basic service level is the only service tier to which subscription is required as a condition of access to premium programming services, where cable systems are technically able to do so.[37] The basic service portion of any such expanded package would continue to be subject only to local rate regulation and the incremental portion would be subject to review solely by the Commission if alleged to be unreasonable under the provisions of Section 623(c).

B. Jurisdictional Issues.

Regulation of basic cable service rates by any governmental entity pursuant to the 1992 Cable Act is permitted only when the franchising authority exercises its legal right to regulate by filing for FCC certification.[38] The statute requires that the local franchising authority must have legal authority to regulate, that it adopt a regulatory approach that conforms to FCC regulations, and that it adopt reasonable procedures to assure due process. Thus, a franchising authority may regulate

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[37] See 47 U.S.C. § 543(b)(8).

[38] Id. § 543(a)(3).

pursuant to the 1992 Cable Act only when it has proper legal authority to regulate and only after its certification takes effect.

When a franchising authority does not file for certification or does not have the legal authority to file for certification, it is not qualified to regulate.[39] FCC jurisdiction is statutorily limited to instances where the Commission disapproves or revokes a certification.[40] Therefore, the FCC may not exercise jurisdiction where the State does not permit the franchising authority to regulate rates, since the FCC is only allowed to assume the jurisdictional power of the franchising authority.[41] A finding by the FCC of effective competition, of course, prohibits all governmental regulation of cable service rates.[42]

This jurisdictional scheme allows franchising authorities and States to choose not to regulate and minimizes FCC involvement in the details of basic rate regulation of individual communities. Franchising authorities may decide that basic rate regulation is not in the best interest of their community. Likewise, States may decide that their subdivisions should not have the power to regulate basic rates, or that such power should

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[39]Id.

[40]Id. at § 543(a)(6).

[41]Id. ("the Commission shall exercise the franchising authority's regulatory jurisdiction").

[42]Id. at §543(a)(2).

be limited.[43] The statutory scheme of the 1992 Cable Act respects these decisions by giving the FCC jurisdiction only if the local authorities, consistent with State law, choose to regulate.

Several commenters asserted that the 1992 Cable Act's mandate that the Commission ensure reasonable basic rates[44] acts as a directive to apply mandatory basic rate regulation by either the franchising authority or the FCC.[45] As paragraph 15 of the Notice points out, the plain meaning of the statute supports that the FCC has limited jurisdiction, but some parties believe that without mandatory regulation neither the franchising authority nor the FCC could ensure reasonable rates. These parties fail to consider that the local franchising authority retains the right to certify at any time and rein in unreasonable basic rates.

Thus, Congress gave franchising authorities discretion to decline to regulate basic rates, for example, if they believe the

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[43]MCATC Comments at 2-6 (seem to recognize that Massachusetts franchise authorities may not have the legal authority to regulate basic rates); New York State Commission on Cable Television ("NYSCCT") Comments at 6 (agree that the power to regulate rates must be conferred from state law).

[44]See 47 U.S.C. § 543(b)(1).

[45]CFA Comments at 123; NATOA Comments at 19-23; MFA Comments at 5-7. The Austin, TX Comments suggest that the FCC might assert broad rate regulation jurisdiction in the absence of filing of certification through its power to prevent evasions under 47 U.S.C. § 543(h). This is an absurd interpretation of the evasions provision; it ignores the jurisdictional limits stated clearly in § 543(a), and, as described below, such broad regulatory power is unnecessary to protect consumers from unreasonable rates.